IN THE

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Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-482

STATE OF MICHIGAN,

Petitioner,

vs.

THOMAS W. TUCKER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, AND THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AS AMICI CURIAE IN SUPPORT OF THE PETITIONER.

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This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Consent to file has been granted by the Office of the Prosecutor of Oakland County Michigan, counsel for the Petitioner, and by Kenneth M. Mogill, Esq., counsel for the Respondent. Letters of consent of both parties have been filed with the Clerk of the Court.

INTEREST OF THE AMICI CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE) is a national not-for-profit citizens organization incorporated under

the laws of the State of Illinois. As stated in its by-laws the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness to deal with crime.

The International Association of Chiefs of Police, Inc. (IACP) represents over 5,000 chiefs and top executives of police departments and other law enforcement agencies in all 50 states and in 85 foreign countries. The IACP serves the law enforcement profession and the public interest by advancing the art of police service. Its aims are to foster police cooperation and the exchange of information and experience among police administrators throughout the world, and to encourage adherence of all police officers to high professional standards of performance and conduct. With regard to police professionalism law-related activities, the IACP, in 1970 formed the Police Legal Center of the IACP. This center serves as a hub for legal activities affecting police work, it coordinates the activities of Police Legal Advisors and Police Legal Units, nationwide, and publishes numerous periodicals, documents, and in-service legal training materials for use both by police officers and executives.

The interest of *amici* in the instant case stems from the importance of the issues involved, the resolution of which will have a direct and material impact upon the effectiveness of law

enforcement. The issue in this case to which *amici* address ourselves: "Whether the standards set forth in *Miranda* v. *Arizona* are too restrictive in excluding admissions and are not mandated by the United States Constitution," is, by definition, one of the most important issues to come before this Court this term, or for that matter, any other term. *Miranda*, at least in the rigid and inflexible application of its dictates which we shall describe, has had a major deleterious effect upon the effectiveness of law enforcement, with a concomitant effect upon the rights of the law-abiding to be reasonably free from criminal harm.

Miranda was decided on the narrowest possible basis—five to four. The dictates of *Miranda* have now been the law for almost seven years. This Court has not before agreed to consider the implications of the decision. We believe that this case presents a vehicle for the airing of the effects of this controversial case. *Amici*, in accordance with their stated interests, seek to present our views concerning the effects of *Miranda* to this Court.

SUMMARY OF ARGUMENT.

Amici agree with and support the legal arguments of the State of Michigan regarding the derivative use of third party testimony obtained from a suspect who had not been properly advised of his rights in accordance with *Miranda* v. *Arizona*, 384 U. S. 346 (1966); however we will address ourselves to the second question certified: "Whether the standards set forth in *Miranda* v. *Arizona* are too restrictive in excluding admissions and are not mandated by the United States Constitution?"

Amici believe that the victims of crime—individual victims in individual criminal cases and potential victims of criminal violence—are entitled to representation before this Court. Likewise the right and duty of society to protect the law-abiding from the lawless is entitled to such representation.

Mr. Justice White, dissenting in *Miranda* (384 U. S. at 539, 542, and 543) expressed concern over the impact of that case

upon the rights of the victims and the right of society to protect the victims. While we are committed to the principal of fundamental fairness to criminal suspects, *amici* share the concern expressed by Justice White, and we believe that the rigidity and inflexibility of the dictates of *Miranda* have tipped the balance in favor of the criminal suspect and against the law-abiding.

The dictates with regard to the admissibility of statements of the accused which are embodied in the majority opinion in *Miranda* are absolute, rigid and inflexible. They leave no margin for error on the part of law enforcement officers; if the slightest inadvertent *Miranda* "violation" has taken place, the statements of the accused must be suppressed and often the convictions of those whose factual guilt is patent must be reversed and in many cases they must be freed.

As the dissenting justices in *Miranda* pointed out, the language of the majority opinion is couched in such absolute terms that no other factors, such as the obvious voluntariness of a statement or the attempts of law enforcement officers to comply in good faith with *Miranda's* dictates, must be disregarded. This contention is borne out by expert analysis made by a credentialed observer of the *Miranda* majority opinion.

In a broader sense, absolutes such as are found in *Miranda* have no place in such a non-finite area as the law—especially the enforcement of the criminal law. In a discipline as difficult and transitory as the criminal law, in which many learned judges often cannot agree, the rigidity and inflexibility of cases such as *Miranda* can often lead to the most serious miscarriages of justice.

In order to prove this point, *amici* present examples of appellate cases in which the absolute dictates of *Miranda* have required the reversal of the convictions of those whose confessions to crimes—in many cases the most serious sort of crimes—were held to be invalid. These reversals came about, moreover, despite overwhelming evidence that the police were

acting in good faith, the "violations" were highly technical, and the statements made were, by any objective standard, completely voluntary.

The instant case presents a vehicle for the Court to modify the excesses caused by the inflexibility of *Miranda*. *Amici* do not contend that the Court should abandon the concept that a criminal suspect ought to be advised of his right to be free from self-incrimination; rather we urge a modification of the all-or-nothing, no-margin-for-error, rigidity of *Miranda*.

A modification might take the shape of a return to the pre-*Miranda* standard of voluntariness, or it might take the shape of some lesser modification such as reposing some discretion in the trial court to admit a defendant's statements in cases where there was no coercive police conduct and the statements were made voluntarily, or where any of the *Miranda* violations were inadvertent, or where a serious miscarriage of justice would result if the statements were not admitted.

In this context, *amici* urge that the Court modify *Miranda's* inflexibility with regard to both confessions and admissions.

The facts of the instant case present a proper vehicle for this Court to modify *Miranda*, as it is clear that there were no coercive police practices involved, the defendant's statements were made voluntarily, the *Miranda* "violation" was completely inadvertent, and a miscarriage of justice would surely take place if the instant defendant's rape conviction should be reversed.

A modification of *Miranda's* absolute commandments would do no injury to the concept of *fundamental fairness* to criminal suspects. Egregious police conduct and coerced confessions, the basic truthfulness of which is in doubt, would still be inadmissible, as they were before *Miranda*, and, indeed, they should be. *Amici* urge only a balance between the rights of the accused and the rights of the law-abiding in our society.

Amici anticipate a counter-argument that any modification of *Miranda* would be used by the police to oppress minorities

and the poor and powerless. Our response is two-fold. First, if a police officer uses coercive tactics to extort a confession from a member of a minority race, that confession would be inadmissible under any modification of *Miranda* which we believe this Court might make. Second, and perhaps more importantly, it is precisely the minorities and the poor and powerless who bear the greatest burden of violent crime. If fewer criminals were freed, to return to the ghetto to victimize again, the great majority of ghetto dwellers who are decent, law-abiding citizens living in constant fear of crime, would deservedly benefit.

For these reasons *amici* urge this Court to utilize the instant case as a vehicle to modify the rigid and inflexible mandate of *Miranda* with regard to the admissibility of confessions and admissions.

ARGUMENT.

Amici will not reiterate the legal arguments made by the State of Michigan in this case with regard to the derivative use of third party witness testimony obtained from a suspect who had not been advised in accordance with the requirements of *Miranda* v. *Arizona*, 384 U. S. 346 (1966). We do, however, agree with, and support, such arguments and wish to associate ourselves with them. In this context we urge the Court to resolve the conflict of the lower courts on this issue in favor of the reasoned and common sense position taken by the United States Court of Appeals for the District of Columbia Circuit in *Smith* v. *United States*, 324 F. 2d 879 (1963) and *Brown* v. *United States*, 375 F. 2d 310 (1967), and by the Supreme Court of the State of Michigan in unanimously affirming the conviction in the instant case. 385 Mich. 594, 189 N. W. 2d 290 (1971).

Amici will address ourselves to the second question certified: "Whether the standards set forth in *Miranda* v. *Arizona* are too restrictive in excluding admissions and are not mandated by the

United States Constitution?" (Petition for Writ of Certiorari of the State of Michigan, page 3). We will present to the court evidence that the inflexible and rigid standards for the admissibility of confessions and admissions found in the absolute language of the *Miranda* majority opinion are having a significant deleterious impact upon the enforcement of the criminal law and we ask this court to review these standards in the context of the instant case.

I. The Victims of Crime Are Entitled to Representation Before This Court.

Mr. Justice White, in his dissenting opinion in *Miranda* v. *Arizona*, 384 U. S. 346 (1966), with the concurrence of Mr. Justice Stewart and the late Mr. Justice John M. Harlan, assessed the impact of that decision upon the enforcement of the criminal law and upon the victims of crime. Speaking of the majority decision he stated:

> There is, in my view, every reason to believe that a good many criminal defendants who otherwise would have been convicted on what this Court has previously thought to be the most satisfactory kind of evidence will now, under this new version of the Fifth Amendment, either not be tried at all or will be acquitted if the State's evidence, minus the confession, is put to the test of litigation.
>
> I have no desire whatsoever to share the responsibility for any such impact on the present criminal process.
>
> In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain but a loss in human dignity. (384 U. S. 542)

He then spoke, with extreme irony:

> There is, of course, a saving factor: *the next victims are uncertain, unknown, and unrepresented.* 384 U. S. 543 (emphasis added)

Mr. Justice Clark also dissented from the majority opinion.

Amici seek to represent the "uncertain, unknown, and unrepresented" victims of crime for whom Justice White and his fellow dissenters expressed concern. Our concern, however, goes beyond the representation of a particular individual who happens to become the victim of a crime. We seek, in a broader sense, to represent the vindication of the rights of *all* of the actual and potential victims of crime and of the *right*, and the *duty*, of society to provide for the security of all of the law-abiding citizens of this country.

This right and duty was explicitly expressed by Justice White, again in his dissenting opinion in *Miranda*:

> The most basic function of any government is to provide for the security of the individual and his property. . . . These ends of society are served by the criminal laws which for the most part are aimed at the prevention of crime. Without the reasonably effective performance of the task of preventing private violence and retaliation it is idle to talk about human dignity and civilized values. (384 U. S. 539)

We seek to represent these interests of society, as well as the rights and, indeed the *civil liberties* of those who have suffered or who will suffer, as a result of the reversal of convictions or the outright freeing of patently dangerous criminals via the rigid and inflexible application of the absolute standards for the admissibility of admissions and confessions mandated by the majority of the Court in the *Miranda* decision.

Amici state emphatically that we do *not* seek to represent the rights of the victims of crime to the total exclusion of the rights of criminal suspects. We merely urge that a *balance* be established between these conflicting interests—a balance which does not presently exist due to the rigid application of the *Miranda* rule.

The Fifth Amendment rights of all persons to be free from the use against them of coerced or illegally compelled state-

ments is a precious right and one that must be fully safeguarded. *Amici* in this case do not for a moment condone any police practices, past or present, which are likely to induce anyone to confess to a crime which he did not commit. In *Miranda*, however, the majority of the Court, in its zeal to protect suspected or accused criminals from the consequences of almost *any* statement that they might make, has tipped the balance too far in favor of the criminal suspect, to the extreme and unwarranted detriment of the victims of crime. When this happens, society as a whole must be the loser.

Our position has been succinctly stated by Dr. Sidney Hook, the distinguished professor of philosophy, formerly of New York University, now at Stanford University:

> The potential victim has at least just as much a human right not to be violently molested, interfered with and outraged as the person accused of such crimes has to a fair trial and a skillful defense. As a citizen, most of the rights guranteed me under the Bill of Rights become nugatory if I am hopelessly crippled by violence and all of them become extinguished if I am killed.[1]

II. The Miranda Decision Mandates Too Rigid and Too Inflexible a Set of Absolute Standards for the Admissibility of Statements of the Accused, Which Standards Do Not Take Into Consideration the Necessity for Interrogation in Criminal Investigations.

The dissenting opinions in *Miranda* dealt at length with the lack of any constitutional basis for the majority position and with the lack of wisdom of the policy considerations embodied in that position. We see no need, therefore, to repeat these arguments at any length, although *amici* certainly subscribe to them. We confine ourselves to pointing out just *how* inflexible these standards are.

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1. "The Rights of the Victim: A Reflection on Crime and Compassion," *Encounter*, March, 1972.

Former Chief Justice Warren summarized the majority holding, stating:

> . . . we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure the exercise of the right will be scrupulously honored the following measures are *required*. He *must* be warned prior to any questioning that he has a right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights *must* be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, *no evidence obtained as a result of interrogation can be used against him*. 384 U. S. 479 (emphasis added)

This is about as categorical a mandate as will be found in any court decision any time, anywhere. The warnings must be given, the waiver *must* be secured and proven, and, if there is a failure in any manner to do this, *no evidence* obtained as a result of the interrogation may be used.

As Mr. Justice Clark, dissenting in *Miranda*, pointed out, any failure to follow the Court's mandate ". . . *requires inexorably* the exclusion of any statements by the accused as well as the fruits thereof." 384 U. S. 500. (emphasis added)

The majority rule in *Miranda* is an absolute, inflexible command, phrased in the broadest possible terms, which brooks no abridgment. There is not the slightest recognition in the majority opinion that policemen and prosecutors are human beings and, as such, are prone to error. There simply *is* no margin for error in the majority rule; and, if, perchance, error is

committed during the turmoil and complexity of a criminal investigation the statements of the accused—whether inculpatory or exculpatory—must be suppressed, the fruits of such statements must be excluded, convictions must be reversed, in consequence of which confessed criminals, whose factual guilt is patent, must often be freed.

This is so, moreover, no matter how slight the deviation from the rigid *Miranda* standards, no matter what evidence there might be of the good faith attempts of the police or prosecution to comply with the *Miranda* dictates, and no matter what evidence there might be that, by any other objective standard, the statements of the accused were made voluntarily. *Miranda*, quite simply, serves to suppress the truth; it dictates an all-or-nothing situation with the criminal offender standing to benefit greatly from the slightest inadvertent deviation by law enforcement officers seeking to establish the truth in a criminal investigation.

Mr. Fred P. Graham, then the highly capable and respected Supreme Court reporter for the *New York Times* and an attorney himself, wrote, in 1970, a book entitled, "The Self-Inflicted Wound,"[2] in which he described, from his particular vantage point, the decisions made during the decade of the 1960s in the area of the criminal law by the Supreme Court of the United States under the Chief Justiceship of Earl Warren. Although liberally oriented and basically sympathetic with the "Warren Court's" criminal law decisions with regard to the rights of suspects, Mr. Graham had this to say with regard to the attitude of the majority of the Court with regard to the *Miranda* decision:

> This was the core of the Supreme Court's difficulties over *Miranda*—in order to abolish the abuses that cropped up in some but by no means all police investigations, it would have to condemn the "voluntariness" approach which the Court itself had always approved before and which the police saw as a reasonable way to do their job. If the Court were to frame a prophylactic procedure rigid enough

2. Graham, "The Self-Inflicted Wound," The McMillan Company, 1970.

> to rule out all of the abuses that the voluntariness approach could permit, *it would also outlaw many instances of reasonable, noncoercive police inquiry about crime.* (Emphasis added)[3]
>
> * * * * *
>
> Also, where the previous landmark decisions had imposed rigid but narrow restrictions on state officials' conduct, *Miranda* was to lay down a statute-like code of procedure consisting of four commandments, some of which included sub-commandments.[4]
>
> * * * * *
>
> Despite the Court's zig zag course, its trend was clear: it would continue to cast about for an objective standard by which police questioning could be regulated *and if the standard proved so rigid that the police could not interrogate effectively at all, that would be a tolerable outcome in [the majority of] the Warren Court's eyes.* (Emphasis added)[5]

Amici agree with this appraisal of the *Miranda* majority made by an objective and experienced observer, concerning the absolute nature of the *Miranda* decision.

The inflexibility of the outlook of the *Miranda* majority is also demonstrated by its attitude towards the potential availability of other evidence of guilt, besides the statements of the accused in criminal cases. Chief Justice Warren, writing for the majority stated:

> . . . Our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors rather than by the cruel, simple expedient of compelling it from his own mouth. 384 U. S. 460

This statement appears to recognize only two means of police investigation: 1) independent investigation and 2) compelling evidence from the mouth of the accused. It simply ignores both the fact that in many criminal investigations there may be little or no other evidence than the statements of the ac-

3. *Ibid.*, page 156.
4. *Ibid.*, page 158.
5. *Ibid.*, page 159.

cused, and the fact that, in the majority of cases, the process of interrogation by a competent criminal investigator, in the normal course of his investigation, is neither "cruel" nor "compelling." The latter is a third means of police interrogation in which compulsion of evidence from the accused is not inherent; it is, rather, a search for the truth by questioning a suspect about himself, his actions, and his explanations for them.

As the late Justice Hugo Black, one of the five majority justices in the *Miranda* case, stated in a Fourth Amendment context, which we believe applies equally to the indispensability of the interrogation procedure:

> It is always easy to hint at mysterious means available just around the corner to catch outlaws.[6]

Likewise, in *Criminal Interrogations and Confessions*, the authors, who disavow the use of any tactics or techniques which might induce confessions from the innocent, describe various situations in which statements of the accused may be the principal or, in some cases, the only means of proving the guilt of the perpetrator of a crime:

> . . . A man is hit on the head while walking home late at night. He does not see his assailant nor does anyone else. A careful and thorough search of the crime scene reveals no physical clues. Then take the case of a woman who is grabbed on the street at night and dragged into an alley and raped. Here, too, the assailant was unaccommodating enough to avoid leaving his hat or other means of identification at the crime scene, and there are no other physical clues. All the police have to go on is the description of the assailant himself. She describes him as about six feet tall, white, and wearing a dark suit. Or consider this case, an actual one, in Illinois. Three women are vacationing in a wooded resort area. Their bodies are found dead, the result of physical violence, alongside a foot trail, and no physical clues are present.[7]

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6. *Berger* v. *New York*, 384 U. S. 41, at 73 (1967) dissenting opinion).

7. Inbau and Reid, "Criminal Interrogations and Confessions," Williams and Wilkins Co., Baltimore, Md. (1967), page 214.

Cases such as these show the absolute necessity of police interrogation of criminal suspects; yet this necessity was largely ignored, or at best paid lip service to, by the majority of the Court in *Miranda*.

In addition, we suggest the broader point that, in a discipline such as the law, and particularly the highly complex area of the law pertaining to criminal investigations, there is simply no place for categorical absolutes such as those embodied in the *Miranda* opinion.

In the finite sciences such as physics or mathematics we must perforce deal with absolutes. A falling body, for example, accelerates its fall at 32 feet per second, per second, no more and no less. The field of law, however, is by no means such an exact science. This is clearly illustrated by the fact that, in many, if not most, appellate opinions, learned judges cannot agree about the law. An outstanding example is the *Miranda* case itself; it was a five to four decision.

Chief Justice Burger has pointed up the fallacy of a resort to absolutes in the area of the enforcement of the criminal law. In his dissenting opinion in *Bivens* v. *Six Unknown Named Narcotic Agents*,[8] he criticized the absolute, across-the-board application of the Exclusionary Rule to all Fourth Amendment violations:

> Although unfortunately ineffective, the exclusionary rule has increasingly been characterized by a single, monolithic and drastic judicial response to all official violations of legal norms. Inadvertent errors of judgment that do not work any injustice will inevitably occur under the pressures of police work. These honest mistakes have been treated in the same way as deliberate and flagrant *Irvine* type violations of the Fourth Amendment. For example in *Miller* v. *United States*, . . . reliable evidence was suppressed because of a police officer's failure to say a "few more words" during the arrest and search of a known narcotics peddler. 403 U. S. at 418.

8. 403 U. S. 388 (1971).

We submit that the same "single, monolithic and drastic" response is to be found in the absolute approach taken by the *Miranda* majority towards confessions—an approach which has no place in an area as difficult as the utilization of interrogation procedures by criminal investigators in the determination of deception or truthfulness on the part of persons suspected of having committed criminal offenses.

III. The Rigidity and Inflexibility of the Absolute Application of the Miranda Rule Has, in Many Cases, Resulted in the Victimization of Individuals, and of Society, by Requiring the Reversal of Convictions of Criminals Despite the Fact that the Miranda "Violations" Were at Most Technical and the Confessions Were by Any Objective Standard Voluntary.

Justice White, in his dissenting opinion in *Miranda*, predicted that a good many criminals would, under the *Miranda* mandate, " . . . either not be tried at all or acquitted if the State's evidence, minus the confession is put to the test of litigation." 384 U. S. 542

The necessary flexibility which would have helped to alleviate the consequences which Justice White predicted was not permitted by the majority in *Miranda*. We here illustrate the result of this inflexibility through examples of cases, selected from a much greater number of cases, in which Justice White's prediction of miscarriages of justice has been sustantiated. They are actual appellate cases, and they present a clear picture of the effects of *Miranda*.[9]

9. We are mindful, of course, that there have been some attempts at empirical studies of the effects of *Miranda* upon law enforcement made by spokesmen for both sides of the question. We believe that, in this instance, the use of actual cases presents a clearer picture than do the studies. Our reasons for this are twofold. First, we believe that the studies to date, both pro and con, have serious weaknesses: the bias of those conducting the studies; the relatively small and scattered samples involved; and the presence of extrinsic factors which are simply not capable of measurement,

Again, we wish to emphasize that we believe that fundamental fairness—to society as well as to the accused—requires that a confession, to be admissible, must be voluntary. We submit, however, that the absolute and total inflexibility of the *Miranda* rule often requires the reversal of convictions and the freeing of criminal suspects in cases in which there was no lack whatsoever of such fundamental fairness and it is *only* the rigidity of the *Miranda* rule, as interpreted by appellate and trial courts, which requires reversal.

The interrogation process from start to finish is extremely complex. It is a process in which there is so much room for error, yet one for which the application of the rigid rule of *Miranda* leaves no margin for error at all. Mr. James B. Zagel, Assistant Attorney General of the State of Illinois, in a comprehensive analysis of *Miranda* and its progeny has categorized some of the major "issues in *Miranda*" in the following manner:

Is the situation custodial?

Is It Interrogation?

Is It Interrogation by Law Enforcement Officers?

Is There Adequate Warning?

Does The Particular Suspect Require Warnings?

Were The Rights Fully Waived?

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e.g. if a suspect refuses to make a statement after being given the *Miranda* warnings, we really cannot know whether he would have refused to make a statement even without the warnings or whether the warnings, in effect, "talked him out" of making a statement."

Our second reason for utilizing an actual case method to present our position is more basic. We believe that *any* case in which a confession, which is by every objective standard voluntary, must be suppressed and a conviction reversed because law enforcement officials ran afoul, in some slight manner, of the rigid standards of *Miranda*, is, in fact, a miscarriage of justice. Moreover, when such cases are multiplied by a factor of hundreds, there has occurred a significant breakdown in the criminal justice system.

Several of these studies and their results are summarized in Graham, "The Self-Inflicted Wound" (*supra*, pages 11, 12) at pages 279-282.

Under What Conditions May a Suspect be Interviewed More Than Once?

Does It Apply To Misdemeanors and Other Proceedings?[10]

This is a formidable array of legal and/or factual situations in which the police officer or prosecutor must act, and, in addition, act in the sure and certain knowledge that because of the inflexibility of *Miranda*, any error may be irredeemably fatal to his case. Against this background we turn to specific cases.[11]

In each of these cases, the court excluded a confession or reversed a conviction based on its interpretation of *Miranda*. If we make the reasonable assumption that the courts did not *want* to reverse the convictions of confessed murderers, rapists and other assorted criminals, then the conclusion is inescapable that the courts felt themselves bound to do so by the absolute language in the *Miranda* opinion.

There are additional factors common to each of the cases presented:

1. There is absolutely no showing of flagrant, wilful or coercive misconduct by the law enforcement officers involved.
2. There is evidence of good faith attempts by the officers to comply with both the letter and spirit of *Miranda*.
3. The *Miranda* violation is at most a highly technical one.
4. By any objective standard the confessions were voluntary, i.e. they would have passed muster with this

10. Zagel, "Confessions and Interrogations after Miranda" published by the National District Attorneys Association, January 1972.

11. Although they were not selected because of the seriousness of the crimes, most of the cases do involve serious crimes such as murder, rape or robbery. The actual crime involved, however, is not the central issue, for the fact must be borne in mind that Miranda applies, across the board, at least to all felonies, so that an appellate case which requires the reversal of, say, a relatively minor forgery conviction may also require the reversal of several rape or murder convictions of other offenders because of the application of the holding in the less serious forgery case.

Court's pre-*Miranda* holdings dealing with "voluntariness" and the "totality of the circumstances" as the standards by which confessions were measured.[12]

Case No. 1. *Commonwealth* v. *Singleton*, 266 A. 2d 753, 439 Pa. 185, Supreme Court of Pennsylvania. (1970)

Defendant confessed to and was convicted of murder in the beating death of his mother, sister and grandmother. The court noted that the Commonwealth's case consisted primarily of defendant's incriminating statements; however his statements were nullified and his conviction was reversed. The defendant had been given the proper *Miranda* warnings in every respect execpt that he was advised that anything that he said could be used "for or against" him. The court held that the use of the single word "for" vitiated the entire confession under the *Miranda* holding.

Case No. 2. *Commonwealth* v. *Davis*, 270 A. 2nd 199, 440 Pa. 123, Supreme Court of Pennsylvania. (1970)

Again the court reversed a first degree conviction for robbery—murder because the word "for" was included in otherwise satisfactory warnings.

Case No. 3. *Biggerstaff* v. *State*, Okl. Cr., 491 P. 2d 345, Court of Criminal Appeals of Oklahoma. (1971)

The defendant—convicted of first degree murder—had been given *Miranda* warnings which were satisfactory in all respects except that he was advised that he was entitled to an attorney "at any time." The court found this warning to be insufficient

12. *Coulumbe* v. *Connecticut*, 367 U. S. 586 (1951); *Rogers* v. *Richmond*, 365 U. S. 534 (1961); *Fikes* v. *Alabama*, 352 U. S. 191 (1957). The "totality of circumstances" test was even applied in one of this Court's post-*Miranda* decisions in a case involving a pre-*Miranda* confession. In *Frazier* v. *Cupp*, 394 U. S. 731 (1969), the validity of a confession was sustained even though the police interrogator falsely told the defendant that his accomplice had confessed, and even though the defendant had said: "I had better get a lawyer before I talk any more." Mr. Justice Marshall, writing for the Court viewed this statement as a "passing comment" rather than as a request for a lawyer.

advice to the suspect that he had a right to the presence of an attorney during questioning. It cited a similar holding by the United States Court of Appeals for the Fifth Circuit in ***Atwell*** v. *United States,* 398 F. 2nd 507 (1968). The Court in *Atwell* rejected the use of the words "at any time," stating: "'Anytime' *could* be interpreted by the accused in an atmosphere of pressure from the glare of the law enforcer and his authority, to refer to an impending trial or event other than the moment the advice was given and the interrogation following." 398 F. 2nd at 510. (Emphasis added)

The court in *Biggerstaff* also noted that, absent the defendant's confession, which had been ruled inadmissible, the evidence was not sufficient to sustain a conviction for the crime of murder.

Comment: In the foregoing cases the courts apparently felt compelled by the rigidity of the language in the *Miranda* decision to engage in extremes of semantic gymnastics in order to hold the confessions of three convicted murderers inadmissible despite the fact that the intention on the part of the police to comply with *Miranda* is clearly apparent. The courts in these cases completely disregarded any objective standard which would demonstrate that the confessions were voluntarily made and they delved into the murky area of what the suspects *might* have understood from otherwise sufficient warnings.

Case No. 4. *Franklin* v. *State,* 252 A. 2d 487, 6 Md. App. 572, Court of Special Appeals of Maryland (1969).

Defendant was convicted of several armed robberies. He was given full and proper *Miranda* warnings on September 4th, 1967 at which time he made incriminating statements about certain of the armed robberies. On September 6th, 1967 he was interrogated about the armed robbery involved in his appeal. Upon this latter occasion he made statements which were used to impeach him when he testified at trial.[13] Defendant

13. This case was decided prior to this Court's decision in *Harris* v. *New York,* 401 U. S. 222 (1971) in which the use of such statements for impeachment purposes was held to be proper.

was not readvised of his rights under *Miranda* at the September 6th interrogation. The court held that the September 6th statements were inadmissible because of the two day hiatus since the original warnings had been given. The court gave no reason for this decision except to state that the two day delay "would fall short of compliance with the dictates of the *Miranda* decision." 252 A. 2d 487 at 491.

Case No. 5. *People* v. *Milton*, 75 Cal Rptr. 803, Court of Appeal of California (1969).

Defendant, when arrested for the murder of his wife was given the proper *Miranda* advisements by the arresting officer, at which time he stated that he did not wish to make a statement. Some two hours later a detective, who was apparently unaware of the previous warning and refusal to make a statement, again properly advised the defendant of his rights, whereupon the defendant made admissions which were inconsistent with his later trial testimony. The appellate court held that the admissions should have been excluded. Defendant's murder conviction was thus reversed, *despite the fact that the second interrogator was unaware of the first refusal and that the admissions made at the second interrogation were apparently voluntary*.

Case No. 6. *Scott* v. *State*, 475 S. W. 2d 699, Supreme Court of Arkansas (1972).

In reversing the defendant's conviction for the rape of a two-year-old girl, the court noted in this case that there were no eyewitnesses to this crime as the victim was too young and the only other witness, her father, had been killed in an automobile accident. Defendant was properly advised and refused to make a statement. Then, according to the Court: "About three months later a deputy sheriff who was passing the cell where Scott was confined asked him, in the course of what appears to have been a bantering conversation, if he had raped the little girl. Scott replied, 'yeah'." 475 S. W. 2d

This statement was held invalid as not being voluntarily made under *Miranda* and the rape conviction was reversed.

Comment: The preceding cases are examples of lower courts engaging in some fairly energetic "second-guessing" of law enforcement officers, because of the compulsion of the inflexible dictates of *Miranda*. Although in each case there is no evidence of coercive questioning and the statements were made voluntarily, the courts saw fit to reverse the convictions on very close issues such as the timing of the questions asked, the fact of a prior refusal to talk even though this may well have been unknown to the second questioner, or as in the *Scott* case, where there was no real attempt at interrogation at all. In each case it clearly appears that *only* the inflexibility of *Miranda* dictated the reversal.

Case No. 7. *United States* v. *Millen*, 338 F. Supp. 747, United States District Court for the Eastern District of Wisconsin (1972).

Defendant was a practicing attorney who caused a package of hashish to be mailed to himself at the office of the law firm for which he worked. Federal agents observed him receive the package and later arrested him. Defendant, after being given the *Miranda* warnings by a federal agent, made inculpatory statements and told the agent where the package was located in his office. Despite the fact that defendant was a *practicing attorney*, his conviction was reversed because the Court found that he had not sufficiently waived his rights under *Miranda*, and the Court suppressed physical evidence in the case, in part because it was located through defendant's statements.

Case No. 8. *Commonwealth* v. *Goldsmith*, 363 A. 2d 322, 438 Pa. 83, Supreme Court of Pennsylvania (1970).

Defendant, wanted for murder and manslaughter, surrendered to the police accompanied by his attorney. The attorney left and defendant was interrogated by the police, at which time he made incriminating statements. Prior to his interrogation he was asked seven questions concerning whether or not he understood his rights, to which he replied: "I will give you

an oral statement. My lawyer said I could make one without giving you the motive of what happened." The court held that his was an invalid *Miranda* waiver and it rejected the inference that defendant had knowledge of his rights from the fact that he came to the station with his attorney.

Case No. 9. *DuPont* v. *United States*, 259 A. 2d 355, District of Columbia Court of Appeals (1969).

A Washington, D. C. police officer received information that defendant had a machine gun concealed in his bed in a girl's apartment. After receiving from the girl a valid consent to search her apartment, the officer seized the machine gun from the defendant's bed. Defendant was arrested. At the police station the arresting officer called defendant's attention to a large sign on the wall containing the *Miranda* warnings. Defendant refused to look at it. Later a Sergeant Evanoff interrogated defendant. He attempted to give defendant the *Miranda* warnings, but defendant cut him off stating, "I know my rights, man," and, according to the court, defendant indicated: ". . . that Sgt. Evanoff didn't have to go into that." Again defendant did not look at the card on the wall.

Thereafter, defendant made inculpatory statements exonerating the girl in whose apartment the gun was found, called his attorney, and then made further inculpatory statements. The court suppressed all of the defendant's statements as violative of *Miranda*.

Chief Judge Hood, dissenting, stated that under these facts:

> I think *Miranda* must be interpreted in a realistic and reasonable manner, and that the officers did all that reasonable men could do.
>
> What more could the officers have done? Should they have forced appellant to read or listen? Should the detectives have continued to read when it was obvious that appellant was not listening?
>
> It is my opinion that when officers make a good faith effort to inform an arrested person of his Miranda rights and that person refuses to pay any attention to the officers,

such person has no standing to claim that he was not informed of his rights. 259 A. 2d. 359 and 360.

Comment: In the three preceeding cases the investigating officers had given, or attempted to give *Miranda* warnings, and they had every reason to believe that the defendant was well aware of his rights, yet in each case the rigidity of the *Miranda* rule compelled the courts to suppress the statements made. The fact that any commonsense analysis would dictate that one who is a practicing attorney, one who states he knows his rights, or one who arrives at the police station with an attorney would be aware of his rights and that the statements were voluntary was disregarded by the courts and the inflexible *Miranda* standards were applied.

* * * * *

These cases are not isolated instances. They were culled from well over 150 appellate cases, decided during the years 1968—1973 in which law enforcement officers ran afoul of the inflexible standards dictated by *Miranda*, even though there was a good faith attempt to comply with *Miranda* and no coercive tactics had been used.[14] And these are only appellate cases. There is simply no way, at least in the time allowed for the filing of this brief, to determine how many cases have been dismissed at the trial level, or simply have not been brought to trial, because of asserted *Miranda* violations. We believe that, at a conservative estimate, such cases, nationwide, would number in the hundreds, perhaps the thousands.

It is true, of course, that in many cases in which a confession is suppressed and a conviction reversed, there may be enough "untainted" evidence to secure a conviction at a new trial, but in many instances this is not so, and, without the use of the defendant's statements, he may have to be freed or the charges against him dismissed.

Whether or not a given defendant is re-convicted or freed is

14. Research Source: Nedrud, The Criminal Law, 1968-1973, LE Publications, Chicago, Illinois.

not the central part of our argument. The rigid dictates of *Miranda* apply to *all* cases (at least all felony cases) involving confessions, and whether or not there is sufficient evidence, absent a confession, to convict will be a completely fortuitous event in any particular case, depending upon the nature of the crime, the care with which the criminal goes about covering his tracks, and the luck or diligence involved in the police investigation. As we pointed out in Section II of this argument, there are some crimes in which a confession or admission by the guilty party will be the *only* evidence available to the prosecution.

It is, beyond any question, a travesty of justice when a murderer, rapist, robber, or other cirminal must be foisted onto society because his otherwise voluntary confession fell, in some slight measure, short of the *Miranda* requirements, and no other evidence exists to convict him. This travesty affects many innocent, law-abiding persons. The criminal's original victims, or, in some cases the families of his victims, surely suffer at seeing the one who has victimized them go unpunished. Should the beneficiary of *Miranda's* commandments commit other crimes, additional victims surely suffer at his hands.[15] Society itself suffers, in addition, because it has failed to vindicate the rights of the lawabiding against the lawless and violent.

Our argument, however, goes deeper than the question of whether, in a given case, a confessed cirminal must be freed or whether there is sufficient "untainted" evidence for a re-trial.

15. Cases such as this do happen. For example, in Baltimore George McChan, who was serving a 40 year term for robbery was freed because his confession was insufficient under *Miranda*. Four days after his release he was re-arrested and convicted for the robbery-murder of a restaurant proprietor. (Source: The Baltimore City Police Department and a letter dated March 7, 1967 from then States Attorney Charles E. Moylan Jr. of Baltimore City, Maryland to Senator John L. McClellan, describing the effect of the *Miranda* decision in Baltimore.) In Jacksonville, Florida, a confessed murderer who had been released because his confession was invalidated, was subsequently arrested on two counts of armed robbery and two counts of assault to murder. He pled guilty to one robbery charge and received a life sentence. (Source: Jacksonville, Florida Police Department Attorney Mr. Richard Gentry.)

We believe that the rigid and inflexible standards for the admissibility of confessions and admissions which are dictated by the absolute language in *Miranda* have no place in an area as complex as the enforcement of the cirminal law. We submit that fairness to the actual and potential victims of crime in our society requires that this court re-examine the rigidity and inflexibility of the *Miranda* ruling with a view towards restoring a balance between the interests of criminal suspects on the one hand and the law-abiding citizens on the other.

IV. The Instant Case Provides a Vehicle for This Court to Review and Modify the Rigid and Inflexible Requirements of the Miranda Decision With Regard to Confessions as Well as Admissions. We Urge This Court To Do So.

As we pointed out in the brief prefactory remarks to our argument section, *amici* address themselves to the second question certified by this Court in the instant case: "Whether the standards set forth in *Miranda* v. *Arizona* are too restrictive in excluding admissions and are not mandated by the United States Constitution?"

We note that the actual question presented to this Court deals only with admissions; however, our argument in this section will deal with the broader question of both admissions and confessions for the following reasons:

1. The majority in *Miranda* certainly made no distinction between admissions and confessions.
2. The petitioner has argued the issue of confessions as well as admissions in its brief.
3. In its Petition for Certiorari, at page 11, the State of Michigan presented this Court with arguments dealing with confessions as well as admissions: "While in total agreement that such important [Fifth Amendment] constitutional rights must be carefully protected, Petitioner urges that confessions may be intelligently and voluntarily made, *in some instances*, even absent the *Miranda* warnings." (emphasis in the original).

4. Our argument is not concerned with the nature of the statements made, i.e., confessions *vis-a-vis* admissions, but rather with the absolute flexibility of the dictates of *Miranda* as applied to *any* statement made by a criminal accused.

5. In the instant case the admissions made by the defendant—the name of an individual to whom the defendant had made incriminating statements and who the defendant apparently hoped would support a totally spurious alibi, could hardly be more damaging than a confession.

In this argument we are not urging the Court to abandon totally the concept of advisement to a suspect of his right to be free from self-incrimination. We do, however, urge some modification of the all-or-nothing, no margin-for-error, inflexibility of *Miranda* which we have described in the preceeding section.

We respectfully urge the Court to utilize the instant case as a vehicle to make such a modification as it sees fit: perhaps a return to the pre-*Miranda* voluntariness standards for determining the admissibility of confessions in the "totality of the circumstances," with the presence or absence of warnings to be considered along with other interrogation circumstances in the determination of a confession's voluntariness or trustworthiness; perhaps some lesser modification such as reposing some limited discretion in trial courts to admit or use the accused's statements, even though *Miranda* has been "violated," if:

1. No coercive tactics or egregious police conduct was involved; and,

2. The "violation" was inadvertent or can otherwise be satisfactorily explained; or

3. The statments appear to have been made voluntarily, *except for* the *Miranda* violation; and

4. A miscarraige of justice—i.e., the freeing, or the reversal of the conviction of a serious criminal offender whose factual guilt is patent.

The instant case presents just such a situation.[16] The respondent was convicted of a horribly brutal rape and assault. So brutal, in fact, was the beating administered to the victim that she has never been able to recall what happened to her or to identify her assailant. Defendant's dog was found in the victim's house, which led to his becoming a suspect. When he was interrogated, pre-*Miranda*, the interrogating officer complied with all of the law then in effect in the State of Michigan, but he omitted the admonition, which *Miranda* was soon to require, that the suspect could have court-appointed counsel. Defendant gave the police the name of one Henderson apparently in the hopes that Henderson would support defendant's completely false alibi about being with him (Henderson) at the time of the crime and that the scratches on defendant's face were caused by a goose. Henderson, unfortunately for the defendant, refused to confirm this alibi and gave extremely damaging testimony against defendant at his trial. Concededly the prosecution learned of Henderson from defendant's statement and the prosecution would not have obtained Henderson's testimony except for the defendant's statements.

Defendant's statements were made pre-*Miranda* but his trial was post-*Miranda* and so, under the ruling of *Johnson* v. *New Jersey*, 384 U. S. 719 (1966), *Miranda* applied to his statements in its full rigidity. Defendant's statements were held inadmissible as violative of *Miranda* but the testimony of Henderson was admitted and this admission was sustained on appeal by the Michigan Court of Appeals and the Michigan Supreme Court.

The United States District Court for the Eastern District of Michigan, however, reversed defendant's conviction upon his *habeas corpus* petition, holding that Henderson's testimony was the "poisoned fruit" of the *Miranda* violation and that it should have been held inadmissible. The United States Court of Ap-

16. This analysis is based upon information from the Petition for Certiorari of the State of Michigan and from the lower court opinions in this case.

peals for the Sixth Circuit affirmed this decision. In effect, the two federal courts applied *Miranda* in its most rigid and inflexible aspect. Although admitting that there was no applicable precedent from this Court on the precise issue, the United States District Court held *Miranda* fully applicable to the testimony of Henderson, a holding which, as we have stated, was subsequently affirmed by the Sixth Circuit.

When this situation is placed in the context of the modification of the inflexibility of the *Miranda* rule, which we urge, the following conclusions can be reached: that the defendant's admissions and the fruit thereof—Henderson's testimony—were barred despite the fact that:

1. There is no evidence of egregious police conduct or coercive tactics.

2. The *Miranda* "violation" was clearly inadvertent, as *Miranda* had not even been decided when the interrogation took place and the officers complied with the then existing law regarding the advisement of rights to criminal suspect.

3. Defendant's statements were clearly voluntary; he had been advised of his rights to silence and to the presence of an attorney and he gave an affirmative, although spurious, alibi which he obviously hoped Henderson would confirm.

4. If defendant's conviction is reversed and he must be retried without Henderson's testimony, a miscarriage of justice will obviously take place, for, without that testimony, it is highly likely that defendant will be freed. As the Supreme Court of the State of Michigan, prior to being reversed on *habeas corpus* by the Federal courts, in affirming defendant's conviction, phrased the issue: "In the absence of reversible error—of which there simply is none—the assailant should not be granted a new trial which, in these days of more and more shackling of law enforcement, usually means an order for outright release upon society of one whose record justified the latest sentence imposed."[17]

17. 385 Mich. 594 at 595.

We submit that the rigidity of *Miranda* should be modified in this case, and future cases of a like nature, to the extent that not only the statements of the third party witness should be admissible but also that the statements of the defendant, in the factual context of this case, should be admissible.

A modification of Miranda, either through a return to a voluntariness standard or through the discretion in trial courts to admit admissions and confessions in some instances, would not, in our opinion, do injury to the concept of *fundamental fairness* to criminal suspects which we firmly support. We believe that, as the dissenting Justices in *Miranda* forcefully pointed out, the inflexibility of that case—again, as opposed to fundamental fairness—is not mandated by the Constitution of the United States.

The suggested modification of *Miranda* would in no way condone egregious or coercive police conduct. Even prior to *Miranda* such conduct was not condoned by this Court, nor should it have been. But the inflexible rule in *Miranda* bars even those statements which are not the product of such conduct but rather of those ". . . inadvertent errors of judgment that do not work any injustice [which] will inevitably occur under the pressures of police work."[18] When an officer tells a suspect in the course of otherwise perfect *Miranda* warnings that his statement can be used "for or against" him, or when an officer tells the suspect that he may have a lawyer "at any time," this is the farthest thing in the world from coercive conduct; yet in each of these instances lower courts, bound by the inflexible dictates of *Miranda*, excluded otherwise voluntary statements and reversed murder convictions because of such inadvertent errors. A modification of *Miranda* would prevent such miscarriages without doing harm to fundamental fairness at all.

We believe that the rigid standards embodied in the absolute language of the *Miranda* majority have resulted in no substantial

18. Burger, C. J., dissenting in *Bivens* v. *Six Unknown Named Narcotics Agents*, 403 U. S. 388 at 418, *supra*, page 14.

additional protection of the rights of the accused. Rather, it has resulted in the exclusion of voluntary statements on hyper-technical grounds which have no relation to the fundamental fairness of police activities with regard to the accused.

Nor is the modification of *Miranda* suggested herein any radical notion. This is borne out by the fact that Title II of the Omnibus Crime Control and Safe Streets Act of 1968,[19] which purports to return the voluntariness standards for the admissions into evidence of statements by suspects in Federal criminal cases, passed the United States Senate by a vote of 72 to 4 and the House of Representatives by a vote of 368 to 17. *Amici* do not take a position herein on the *constitutionality* of such legislation; we merely point out that overwhelming majorities of this nation's legislators are in agreement with our basic premise that something should be done about the rigidity of the *Miranda* rule.

Finally, we anticipate that our call for a modification of *Miranda* will be countered by opposing counsel and *amici* as being a new means for law enforcement officers to oppress minorities and the poor and the powerless. Our answer to this anticipated argument is two-fold. First, nothing that we suggest should produce such a result. If a police officer drags in a suspect of any minority race and beats or coerces a confession out of him, then that officer is engaging in precisely that sort of egregious misconduct which we deplore, and which would vitiate any confession or statement made by anyone, either under pre-*Miranda* "voluntariness" standard or under the modification of *Miranda's* inflexibility which we suggest.

More importantly, however, it is patent in that in many cases the police have an absolute need to use admissions and confessions to solve crimes and *far and away the greatest majority of the victims of crime, particularly violent crimes, are the ghetto dwellers, the minorities and the poor and the powerless.* The late Herbert L. Packer, Stanford University Criminologist,

19. 18 U. S. C. 3501.

found in a study, released in 1970, that ghetto dwellers are at least 100 times as likely to be victims of street crimes as are middle class whites livng in the suburbs.[20] According to Professor Packer, one out of seventy ghetto inhabitants fell victim to a mugger, rapist or assailant in 1969, while in the overall population the incidence of these crimes was one in 10,000. Those who should be the major source of concern in the criminal justice system—the victims of crime who happen to be of a minority race—will, in fact benefit if the criminal who preys upon them ceases to be freed, because the rigidity of *Miranda*, returns him ". . . to the street and to the environment which produced him, to repeat his crime whenever it pleases him."[21]

The contention that a relaxation of restraints on police conduct, such as a modification of *Miranda* would entail, will *a fortiori* be used to repress minorities was refuted by Mr. James R. Thompson, then a Professor of Law at Northwestern University and now the United States Attorney for the Northern District of Illinois, in an *amicus curiae* brief presented to this Court by Americans for Effective Law Enforcement, Inc., one of the *amici* herein, in the case *Terry* v. *Ohio*, 392 U. S. 1 (1968):

> The police could, of course, withdraw from the ghetto . . . This alternative might be somewhat tolerable if only criminals lived in the ghetto; at least their interferences with human liberty in the form of murder, rape, robbery and other crimes would be practiced on each other. But others live in the ghetto as well—innocent, law-abiding American citizens by far the overwhelming majority. They are entitled under the Constitution to live their lives and experience the safety of their homes and their streets without fear of criminal marauders. They have suffered enough—discrimination, poverty, lack of education. Must they also be deprived of the protection of the law as well.[22]

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20. Crime Control Digest, March 25, 1970, page 7. See also: "Black Crime Preys on Black Victims" Associated Press, Report in the Denver *Post*, August 23, 1970.

21. White, J., dissenting in *Miranda* v. *Arizona*, 384 U. S. at 542, *supra*, page 7.

22. Brief *Amicus Curiae* of Americans for Effective Law Enforcement, Inc., in *Terry* v. *Ohio*, pages 28 and 29.

In closing our argument we cite to this Court the words of the distinguished Judge Henry Friendly of the United States Court of Appeals for the Second Circuit, speaking in 1968 about the Fifth Amendment privilege against self-incrimination:

> At the end of the 1960s it is necessary to vindicate the rights of society against what in my view has become a kind of obsession with the privilege, which has stretched it far beyond not only its language and history but any justification in policy.[23]

Amici concur, and we urge this Court to modify the inflexibility of *Miranda* in order to restore a balance to this area of the criminal justice system.

CONCLUSION.

The *Miranda* decision mandates a rigid and inflexible set of standards for the determination of the admissibility of confessions and admissions in criminal cases. This inflexibility has resulted in miscarriages of justice in many cases because confessions and admissions have been suppressed, convictions have been reversed, and often criminals whose factual guilt was patent were freed—this despite the fact that no coercive tactics were used by the police, the "violations" of *Miranda* were at most technical, and the statements suppressed were, by any objective standard voluntary.

Amici do not believe that there is a place in an area as difficult and demanding as the enforcement of the criminal law for absolutes such as are mandated by the majority opinion in *Miranda*. We do not advocate an abandonment of a suspect's rights to be free from self-incrimination. Rather, we urge the Court to utilize the instant case as a vehicle to modify the

23. Friendly, *The Fifth Amendment Tomorrow: The Case For Constitutional Change*. The Robert S. Marx Lectures for 1968 at the University of Cincinnati College of Law, November 6, 7, 8, 1968.

extreme rigidity of *Miranda* so that a balance may be established between the rights of the criminal accused and the rights of the law-abiding citizen.

Respectfully submitted,

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